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Supreme Court, U.S.
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In the

Supreme Court of the United States

No. 502

THE LINCOLN NATIONAL LIFE INSURANCE CO.,
Petitioner (Defendant),
vs.
ROSA LEE ROOSTH,
Respondent (Plaintiff).

PETITION FOR CERTIORARI

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

We cannot accept the statement of the case as contained in the Petition for Certiorari because rather than a statement, it is an argument. The case is more aptly stated in the opinion of the Circuit Court, and we will not attempt to elaborate upon it.

REASONS WHY THE APPLICATION SHOULD NOT BE GRANTED

1. The Circuit Court of Appeals was correct in holding that jury issues were raised by conflicting evidence and that the Trial Court should not have withdrawn the case from the jury.

2. There is no conflict by the decision of the Circuit Court of Appeals with prior decisions of this or other circuit courts or with prior decisions of the Supreme Court, or with decisions of the State courts in the State of Texas.

ARGUMENT

The defendant (petitioner) had the burden of proving the policy of life insurance was procured by fraud. This, according to the law of Texas, includes proof of the five elements noted in the Circuit Court's opinion.

The crux of the defense is:

(1) That Harold was not in good health because he had essential hypertension, the disease. (We denied he had the disease.)

(2) That he was examined in a Boston hospital in 1950, 1951, and 1953.

(3) That his mother died of hypertension or cerebral vascular accident. (We offered evidence to the contrary.)

(4) That he answered falsely so as to conceal these facts, with the intent to deceive the company, and that the company relied. (We offered circumstantial evidence to

show he acted in good faith and that the company had knowledge of the hospital examination from other sources, so could not have relied.)

If the evidence raised an issue on any one of these points, then it should have been submitted to the jury.

It is readily seen that if Harold thought himself to be in good health (except for the history of a heart attack), there was no occasion for him to conceal the fact of his examinations in Boston, no basis for the charge that he had the intent to deceive, because, at least in his mind, there was no necessity to deceive.

If Harold was not afflicted with essential hypertension as a disease, the jury might consider that his examinations in Boston were not material to the risk.

A proper consideration of this case necessitates a review of the evidence as it reflects on these matters, to determine whether there is any basis for the broad statements by Petitioner that the "majority decision abridges the right of the trial court to direct verdict," and that "majority decision places undue burden on life insurance industry." If the evidence, including both direct evidence and circumstances, is so conflicting that the jury might find either way on the questions, the case should be submitted to the jury.

SUMMARY OF THE FACTS

We must concede that in November, 1950, when Harold was examined at Massachusetts Memorial Hospital his

blood pressure was found to be high, above normal, but not in 1951 or 1953. The company's medical witness said it was high all three times, but other medical witnesses said that in 1951 and 1953 his pressures were within normal range. All medical witnesses agreed that anxiety and strain could elevate the pressure and that Harold's concern and responsibility for Bennie, his brother, in 1950 could account for his elevated pressure at that time. The elevation in pressure would be in proportion to the degree of anxiety.

In 1950 when Harold accompanied his brother to Boston, Bennie was in grave danger of death from essential hypertension, heart and kidney involvement. Bennie was to be operated, a splanchnicectomy to sever the sympathetic nerves which influence blood pressure. Harold Roosth was Bennie's doctor and charged with Bennie's care and responsibility to decide whether Bennie was strong enough to stand the operation. These were the circumstances under which Harold himself underwent a complete physical examination when his pressure was found to be above normal.

There was a difference of opinion among the doctors as to what was normal pressure. Defendant's doctors testified that Harold's blood pressures in 1950, 1951, 1953 and on other occasions were above normal from which they formed the opinion that he was subject to excessive hypertension; that is, essential hypertension, which is a disease. Other doctors disagreed as to what was normal blood pressure, testified that Harold's blood pressure was never above normal on any occasion except when Bennie was operated and that the occasion of stress and strain may have been

responsible for this. They testified that in their opinion that Harold did not have essential hypertension or excessive hypertension. Other testimony and circumstances were offered to show that Harold did not believe himself to be subject to the disease, though we recognize that as opposed to this, circumstances were offered indicating that Harold might have believed that he did have a disease.

Terminology becomes important. "Hypertension" is a general term referring to any elevation of blood pressure, though loosely used it may refer to the disease, essential hypertension. This disease is defined as an elevation of blood pressure from an unknown cause. R. 226.

Dr. Grollman testified:

> "Q. Doctor, will you tell us, please, what is meant by the term hypertension?
>
> "A. The term is often used loosely just as synonymous with high blood pressure but in a more specific sense it is used to mean a disease designated more accurately perhaps as hypertensive cardiovascular disease or just hypertensive disease which is characterized among other things by a rise in blood pressure and other changes which occur in the organs." R. 353.

Dr. Muntz defined "essential hypertension" means hypertension from an unknown cause. "Hypertension itself means elevated blood pressure." R. 624.

Dr. Ruskin said "Hypertension is just a term meaning high blood pressure." R. 706.

Although it is clear that "hypertension" does not strictly refer to a disease such as "essential hypertension" (which

they say Harold had), it was a term used indiscriminately throughout the trial to mean whatever the doctor using it had in mind. For instance, there is hypertension caused by kidney malfunction which is not essential hypertension. R. 356.

This terminology is important because its looseness may account for some of Harold's writings referring to "my hypertension," later discussed. He may have meant merely an elevation of blood pressure, not "essential hypertension" as claimed by the Company.

There was a variety of testimony as to the cause of Harold's mother's death, his statement to the doctors at the Boston hospital, the death certificate, the family history, and the testimony of a surviving brother, all of which presented, we submit, an issue for the jury to decide.

The cause of Harold's death was subarachnoid cerebral hemorrhage (in the coverings over the brain, at the base of his brain). His death occurred at the end of an ordinary day's work in the absence of any stress, strain or emotional disturbance. The cause of death was determined by a post mortem examination. The evidence was in conflict as to what caused or contributed to the hemorrhage. It was contended by the insurance company that it resulted from essential hypertension. The plaintiff offered evidence showing that Harold took prolonged anti-coagulant therapy; that is, took a medicine dicoumarol to reduce the clotting

capacity of the blood, that the insurance company was fully aware of this treatment which was taken to prevent a recurrence of the 1948 heart attack. (Incidentally, it is the same treatment which President Eisenhower has taken since his heart attack.) The evidence was undisputed that this is a dangerous drug which, for unknown reasons, and without warning, may cause the prothrombin time to get out of hand. Prothrombin time is a test made to determine the clotting capacity of the blood. The blood may almost entirely lose its clotting capacity, a dangerous condition referred to as dicoumarol poisoning which may result in hemorrhages in any part of the body, including a cerebral hemorrhage. Some of the doctors testified that it was entirely possible that Harold Roosth's cerebral hemorrhage may have been caused by dicoumarol poisoning. That such hemorrhages may occur in the absence of any elevation of blood pressure.

We must recognize that certain of the alleged misrepresentations are matters of opinion as distinguished from matters of fact. Others are properly classified as fact misrepresentations. The opinion matters concern good health, whether Harold had essential hypertension, whether his blood pressure had been found to be above normal, and what was the cause of his mother's death. The factual misrepresentations involve his failure to disclose that he had been examined at the Boston hospital and had consulted physicians or practitioners within the past five years.

ANALYSIS OF MOST MATERIAL EXHIBITS
(All original exhibits sent up)

Defendant's Exhibits 1, 2 and 3 are the application (Nov. 10, 1956) and medical examination (Dec. 24, 1956) for the insurance showing the representations made by Harold referred to in Plaintiff's petition.

Defendant's Exhibit 17 is the personal history statement of Harold Roosth, taken by Dr. Horowitz, an intern, November 15, 1950, when Harold was first examined at Massachusetts Memorial Hospitals. The material portions read:

> "This is the first M.M.H. admission of this 35 year old physician with chief complaint of hypertension—four years.
>
> "Present illness: About four years ago after discharge from army with no reservation it was noted that he had a b.p. of 160 100-110. He was completely asymptomatic (without symptoms) until the middle of September 1948 when he had two weeks of indigestion followed by full blown posterior myocardial infarction. He recovered and slowly has increased his activity to 5-6 hours of work (internist) a day. Since the coronary, he has ceased smoking and has been taking 150-200 mg. of dicoumarol every other day, following it with a prothrombin time once a week. It runs about 50 per cent of normal. He has no cardiac symptoms of any kind since a complete checkup a year ago shows no change. About eighteen months ago he started having pounding in the head at night when lying down. This has continued. He has kept on a low cholesterol diet for several years, but has not been on salt restriction, rice diet or veraloid. He has been gaining some weight. His diastolic has risen recently to 120, which prompted him to have some studies. He

has never had albumin, has had no I.V.P. studies. He denies visual difficulties, bleeding from any orifice, urinary symptoms or edema. As stated above there have been no cardiac symptoms • • •.

"Family history: Mother died at 39 of cerebral vascular accident. Father died at 61 of coronary; he also had gout. One brother is in M.M.H. now, having had bi-lateral LD Splanch for hypertension.

"Physical Exam.: b.p. 190-120 p. 74 R 20. This is an w.d. (well developed) w.n. (well nourished) man in no distress • • •.

"Impression: 1. Hypertension
2. Scoliosis
3. Unstable left knee

"11 18 50 pt. (patient) discharged. s (without) operation to be followed by the Foundation."

(Note: Was hypertension used to designate essential hypertension the disease or only an elevation of blood pressure?)

Defendant's Exhibit 18—Preoperative History—was taken by Dr. Kinzey, the material portion of which shows:

(1) Known duration of elevated blood pressure—four to five years • • •.

(Note—this refers to Harold's "elevated blood pressure" and not essential hypertension.)

(3a.) Headaches—none • • •.

"Family History of hypertension: Mother—died 39 hypertension. Father died 61 heart attack and gout."

Defendant's Exhibit 20 is a letter dated November 22, 1950, from Dr. Kinzey to Harold Roosth reporting the results of the physical examination. It shows the opthalmoscopic report—eye grounds examination—to be normal (so

interpreted by all the doctors who testified). It shows the blood pressures to be above normal and that Harold reacted to the cold pressor test, but does not state that his condition is diagnosed as essential hypertension.

(Note—opthalmoscopic or eye grounds examination according to other testimony would be one of the first indication of essential hypertension and arteriosclerosis. This report negatives the idea of hypertension as a disease. R. 676, 327.)

Defendant's Exhibit 26 is a letter attached to which is a chloride test chart prepared by Harold and mailed to Dr. Kinzey. As interpreted by some of the doctors, witnesses in the case, this chart shows that Harold's sodium intake was two to seven grams per day.

[Note—The testimony shows that to control blood pressure the sodium (salt) intake must be less than 1 gram per day. R. 651, 676.]

Defendant's Exhibit 28 is a report by Dr. Kinzey to Dr. Arthur Ruskin (which according to Defendant's Exhibit 27, was also forwarded to Harold Roosth). The report shows that Harold had a "checkup" June 11, 1953. It showed (as interpreted by other witnesses at the trial) that the heart check was normal, the opthalmoscopic (eye grounds examination) was normal. The blood pressure of 148/138 was a mistake according to Dr. Kinzey and should have been 148 92. R. 213. It did not diagnose Harold's condition as essential hypertension.

[Note—According to Dr. Ruskin this blood pressure was not above normal (R. 666) though some other doctors disagreed.]

Defendant's Exhibit No. 44 is a letter from Dr. Ruskin to Harold Roosth dated September 10, 1953, reporting to him on the results of the above report from Massachusetts Memorial Hospital.

(Note—The letter is optimistic and encourages Harold in the belief that his condition is good, that he need have no cause for concern.)

Defendant's Exhibits Nos. 29, 30, 31, 32 and 33 are letters from Dr. Smithwick to Harold which, on their face, show that they are form letters of inquiry. Dr. Kinzey testified that it was Dr. Smithwick's habit to forward such letters to all patients in connection with his research work. R. 204. Each letter inquires what special treatment, if any, Harold is receiving for "your hypertension" and encloses a self-addressed postcard with a request that Harold fill it in and return it. Since they are form letters, we can see why there was no attempt to designate whether the "hypertension" was a disease form or only an elevation of blood pressure. Harold wrote at the bottom of Exhibit 22 that he had had no special treatment for "my hypertension" except continuation of salt free regime—although the evidence showed conclusively that Harold had never been on a salt free regime, only a low salt diet. He began a low salt diet after his heart attack in 1948, never salt free. R. 64-66. Mrs. Roosth said this was to lose weight. R. 70.

He returned two of the postcards, Defendant's Exhibit 7 dated , 1956, and Defendant's Exhibit 7A dated January 24, 1957. The 1957 postcard shows that he was on a salt poor diet and took "Raudixin 100 mgm b.i.d. (twice a day). The January 24, 1957, card reads:

> "General state of health excellent. Since my operation I have had the following additional treatment: Diet—low NA—low calory.
>
> "Drugs—dc (discontinue) Rauwolfia—due to weight gain. Remarks: b.p. runs 140-150 80-90. Weight got up to 214 — dieting & discontinuing drugs — weight (down) to 192. Still low calorie. Have you any suggestions? s Harold Roosth, M.D., 1025 Hospital Drive, Tyler, Texas."

(Note—The January 24, 1957, card showed that he had discontinued Rauwolfia due to weight gain, and that he must have discontinued long enough that he had already lost weight from 214 down to 192 lbs. He diagnoses his own general state of health as "excellent." This is the statement of Harold Roosth nearest in point of time to his application for insurance and shows that he believed he was in good health at the time.)

Defendant's Exhibit 25 and Plaintiff's Exhibit No. 2 were opthalmoscopic (eye grounds) examination in November 15, 1951, at the Massachusetts Memorial Hospitals which, according to all medical testimony, showed a normal condition.

(Note—In this examination the arteries of the retina are viewed and is an early way of diagnosing any hypertension disease and arteriosclerosis.)

Defendant's Exhibits 4, 5 and 6 are letters written by him to Dr. Dera Kinzey.

(Note—They reflect that Harold was given to worry, but not much else definite is shown by them.)

Plaintiff's Exhibit No. 6 is the death certificate of Celia Roosth, mother of Harold Roosth, shows that she died May 2, 1928 of "heart block and chronic nephritis."

(Note—Heart block was defined by Dr. Wiley Roosth as a condition where the heart beat slows from a normal of about 80 beats per minute to 30-40 beats to a point where it does not sustain life. This might be caused by nephritis, and nephritis may be caused by a toxemia of pregnancy, or which might go on after the childbirth is over. R. 534.)

Plaintiff's Exhibit 5 was several pages taken from the Lincoln National Life Insurance Manual written for the guidance of the company in issuing policies on persons who had physical disabilities. The pages concerned "blood pressure abnormal." The most material part is on the second page which reads:

> "History three to five years ago—if highest systolic in history three to five years ago was less than 170 and highest diastolic less than 106, disregard.
>
> "History over five years ago—usually disregard."
>
> (Note—Although Dr. Scoins testified this did not apply where the insured also had a history of a heart attack, yet it is evidence on the question of good health, materiality to the risk and reliance. Harold's pressure was never above these limits except in 1950, more than 5 years prior.)

REVIEW OF OTHER MATERIAL EVIDENCE

Rosa Lee Roosth, Plaintiff, a witness in her own behalf. Harold died February 7, 1957, at the end of the day after all patients had gone. R. 45. There had been no disturbance or excitement. R. 46. He had a heart attack in August 1948, but had gradually come back to a full day's work and had made no complaint of illness for four to five months prior to his death. R. 51. Harold and his brother, Dr. Wiley Roosth, had completed plans for a new clinic building in April or May, 1956, and had moved in November 1956. R. 52-53. Edwards (the insurance agent) approached Harold to sell him the insurance. R. 53-54. Prior to his death, Harold was accustomed to swimming, mowing the yard (R. 55), fishing and making night calls (R. 56), active at selling Christmas trees for the Optimist Club (R. 57), active in PTA, went to football games, drove all vacation trips. (R. 58.) Never complained of illness except in 1948 heart attack. Planned for his son to practice medicine with him. R. 60. Accompanied Harold on his last trip to Boston (1953). R. 61. After this checkup, Harold told her that everything checked out fine. R. 62-63. No complaints of headaches. R. 64. Began a low salt diet after his heart attack in 1948. R. 65-66. Food at home was prepared without salt, but he ate out and when he did, had salt in his dishes—not salt free. R. 65. Never complained of pounding in the head. R. 66. She didn't know he had hypertension or high blood pressure, because he never mentioned it. R. 69. The low salt diet was to lose weight. R. 70.

Charles E. Edwards, Witness for the Defendant. General agent for John Hancock Life Insurance Company. Called on Harold Roosth at the suggestion of Sol Edelman. R. 106. Harold wanted mortgage cancellation insurance to cover the cost of constructing the new clinic. R. 107. Original application for $26,000. R. 108. Called on him seven or eight times. R. 108. He recommended Lincoln because of the prior heart attack and Harold was a sub-standard risk. It was Edwards' idea to increase the policy to $50,000 and Harold agreed to it. R. 121. Saw Harold at 3:00 P. M. the day of his death (Harold was his doctor). R. 114. Harold was friendly and his appearance was good; no stress or strain. R. 115. No flushed face and Harold did not complain of his physical condition. R. 116. Harold was rated Table F (Table 6) as a sub-standard risk due to his prior heart attack. R. 120. This increased the annual premium from $1200 to about $1800. R. 121.

M. S. Bennett, a Witness for Defendant. General agent for Lincoln National Life Insurance Company. Edwards told him that the increase from $26,000 to $50,000 was at Edwards' suggestion and he sold Roosth on the increase. R. 130. Lincoln is a leader in the sub-standard insurance business. R. 132.

Dr. Armand Harold Horowitz (by deposition). Intern at Massachusetts Memorial Hospitals June 1st, 1950 through June 1951. Harold was a patient of that hospital and I examined him. R. 189. Took his personal history statement and family history. R. 190-191. This is Defendant's Exhibit 17, is in my handwriting. R. 197.

Dr. Dera Kinzey (by deposition), a Witness for Defendant. On each of Harold's visits (1950, 1951, 1953) he came with his brother "and the primary concern was his brother." R. 207. November 15, 1950, Harold came with his brother who was extremely ill. R. 213. Harold had intermittent type of essential hypertension. R. 227. When we can't classify the type or specific cause of hypertension, we call it essential. It means high blood pressure from a cause not known. R. 226. Harold's brother had an operation—splanchnicectomy. Harold was taking dicoumarol. R. 233. Raqualfia drugs are partly sedative and lower the blood pressure a little bit. Didn't tell Harold to take Rauwiloid (Rauwolfia). R. 267. "He felt that he was under a strain and he felt if he took off weight he would be all right." R. 268. Some times Raudixon is taken for nervous hypertension, but does not control sever hypertension. R. 270. Intermittent hypertension is where the blood pressure may be normal, but under stress and strain it goes up. R. 276. Sympathectomy is a surgical operation. R. 281. Referring to Defendant's Exhibit 34, a memorandum by Dr. Kinzie which contains "Imp. Bi-lateral Peet could be considered, but apparently he is getting along well on present regime. Rx: (1) Try Rauwiloid ½ b.i.d. and in b=d (2) Continue diet." R. 267. Bi-lateral Peet is one of the smallest lease extensive operations. R. 269. I never recommended it. R. 269. To my remembrance we never mentioned to Harold the advisability of having a sympathectomy. R. 286. The only drug Harold ever indicated he was taking from the post cards, Defendant's Exhibits 7 and 7A, was Raudixon.

It is very mild. Some doctors prescribe it as a sedative. He may have been taking it for that. I don't know. R. 270. Hypertension runs in families. R. 287. A person with hypertension would be subject to death from (1) cardiac, (2) hemorrhage, (3) kidneys. R. 289. That is sustained hypertension, although intermittent hypertensives can get in trouble. R. 290. Subarachnoid hemorrhage is not usually associated with hypertension, rather it is caused from a congenital weak spot—an aneurysm. R. 291. Everyone has some form of arteriosclerosis. R. 292.

Dr. Jas. P. Mullowney, a Witness for the Defendant. The pathologist who performed the autopsy. Defendant's Exhibit 35 is the autopsy report. R. 308. Found a hemorrhage in the subarachnoid area. R. 310-11. There are four layers covering the brain, outside is the dura, second is the arachnoid, hird the subarachnoid, fourth to pia. The hemorrhage occurred in the space between the arachnoid and subarachnoid (R. 311-12) with the greatest concentration of blood at the base of the brain (R. 313) at the bifurcation of the basilar artery which I assumed to be the point of the break. R. 315. Looked for but could not find an aneurysm; this does not mean there was none. He suffered a massive hemorrhage of explosive effect which could have completely destroyed the aneurysm. R. 316. Aneurysm is far and away the most frequent cause of subarachnoid hemorrhage. R. 317. Found arteriosclerotic change in the blood bessels. R. 318. Thickening of the arterioles. R. 318-20. Found atheramateous plaques. R. 323. Such plaques are common in people over forty; one in perfect health may

have them. R. 327. Earliest changes in the arteries are recognized in the arteries of the eye by an opthalmologist, referred to as an eye grounds examination. R. 327. Harold took dicoumarol. R. 332. Heart patients take it to slow the clotting of the blood. R. 334. Prothrombin tests are necessary. R. 335. May get out of control from day to day—the blood loses the capacity to clot and hemorrhages may occur in any part of the body. R. 336. Hemorrhage caused by high blood pressure will usually be in the brain itself. R. 342. The commonest cause of subarachnoid hemorrhage is a weakness in the vessel wall. R. 343. Eye grounds examination in 1950, 1951 and 1953 might show little sclerotic changes which might be increased by 1956. R. 345. Hypertension may but does not necessarily accelerate this change. R. 346.

Dr. Arthur Grollman, Witness for Defendant (who never knew Harold Roosth during his lifetime and testified entirely on hypothetical questions and the autopsy report.) "Hypertension" loosely means high blood pressure, but in a more specific sense, means a disease. R. 353. Treatments consist of salt deprivation, Rauwolfia drugs, rest and avoidance of stress and strain. R. 357. There is a family tendency to essential hypertension. R. 358. The hazards of the disease are the heart, hemorrhage and kidneys, in that order. R. 359. Harold's hypertensive condition makes his heart attack history more significant. R. 360. Raudixon is a Rauwolfia drug commonly used to bring blood pressure down somewhat. I am not impressed with the drug except it is a good tranquillizer. R. 364. And any tranquillizer

will lower blood pressure. Hypertension seems to accelerate hardening of the arteries, and a thickening of the arterioles is a reflection of the presence of hypertension disease. R. 366. Hypertension as a disease is calculated to shorten the life span. R. 368. It probably contributed to the cause of Harold's death, and it was actually the primary cause. R. 368. Atheramateous plaques in the vessels shown by Dr. Mullowney's report plus hypertension caused the hemorrhage. R. 370. I assume the absence of an aneurysm because Dr. Mullowney's report did not shown one. Hypertension probably contributed to the development of the underlying atheramateous. R. 371. Dicoumarol could not cause the hemorrhage, but it might make it more destructive in effect. R. 372. Hypertension affected the general soundness of his health. R. 372. In response to a long hypothetical question reviewing certain of Harold Roosth' records, he answers that Harold Roosth' cerebral hemorrhage was caused by his hypertension. R. 373-375. Cold pressor test is not generally used—I don't use it personally. R. 376. Most doctors do not use sympathetic operations. R. 377. Sustained hypertension is the most dangerous. R. 379. Anxiety, worry or tension may cause an increased blood pressure, in some persons greater than in others, depending upon the extent of the anxiety. R. 380. Harold's anxiety over his brother Bennie's condition may have caused a temporary elevation of blood pressure, but doubt if it would continue for days and weeks; not certain whether it could continue for three days (referring to the 1950 examination). R. 382. A normal tensive person may be a reactor to the cold pressor test. R. 384. Harold's favorable reaction to the

sodium amytal test does not prove he was not hypertensive, though it is a favorable test. R. 384. Referring to Harold's blood pressures during the year 1949, which was never shown to be above 160/90, witness says he would have to examine the individual to judge and interpret the readings. R. 387-88. Referring to a Massachusetts Memorial Hospital chart November 1950 which shows Harold's pulse rate was normal, he says that this is favorable, but not of great significance. R. 392. Referring to Defendant's Exhibits 7A and 7 (the post cards), they indicate that his pressure was lower with Rauwolfia discontinued than while he was taking Rauwolfia. R. 394. Blood pressures of 150/90 at 33 years of age (Dr. Muntz reading in 1949) is on the order of abnormality, but I would have to take other things into consideration. R. 402. Just on the limits of abnormal. R. 403. In my opinion Harold had hypertension in November and December 1956, and it contributed to bringing about his death. R. 406. I am strongly influenced by the post-mortem, without which I would be most questionable about a lot of things I have said; taking into consideration the outcome, he was not in good health November and December 1956. R. 407. The eye grounds examination is not as reliable in reflecting true conditions of blood pressure as cutting into the vessels and examining them microscopically (autopsy). R. 408. Interpreting Defendant's Exhibits 7 and 7A, the post cards sent by Harold to Dr. Smithwick, they are to be interpreted to indicate that Harold discontinued Rauwolfia due to weight gain, and that he had gone down from 214 to 192 pounds after discontinuing it. R.

410-411. The doctor who actually takes the blood pressure is in a better position to judge its significance. R. 412. My testimony is colored by the autopsy upon which I rely most strongly. R. 412.

Kenneth A. Balay, Witness for Defendant, Underwriter for Lincoln National Life Insurance Company. Had letter from Dr. Ruskin to Dr. Ghent Graves dated February, 1955, Defendant's Exhibit 37 (R. 431), which did not indicate to me that Harold had been in Massachusetts Memorial Hospitals for treatment concerning hypertension. R. 436. Plaintiff's Exhibit 5, Lincoln National's Manual on high blood pressure which states that pressures under 170 106 during the period three to five years prior may be disregarded. R. 478. During this period I do not know that Harold's pressure was ever above 170 106. R. 479. There is no inquiry in the manual about pressures more than five years prior. R. 479. I knew from Dr. Ruskin's letter (Defendant's Exhibit No. 37) that Harold had X-ray and electrocardiogram or blood studies at Massachusetts Memorial Hospital, but didn't feel it was necessary to investigate it further. R. 480. If I had known Harold had headaches, I might have made additional investigations of his blood pressure and other things. R. 483. Rated Harold Table F (Table 6). This increased the policy premium from $1094 to $1922. Lincoln makes a practice of taking sub-standard risks—those who are not in good health. R. 487. Lincoln's manual concerning blood pressures are without consideration of other ailments. R. 493. Blood pressure taken in connection with a prior heart attack is more serious. R. 494.

Dr. William A. Scoins, Witness for Defendant, Chief Medical Director for Lincoln National Life Insurance Company. We accept the applications as true to appraise the risk. R. 498. Would not have considered Harold if we had known he had hypertension in addition to a heart attack. R. 499. First time we knew Harold had been a patient at Massachusetts Memorial Hospital for hypertension was after his death. R. 501. I had no knowledge at the time of Harold's application that he had been to Smithwick Foundation or was on a salt restricted diet. R. 502. Salt restricted diet is because of dropsy, decompensation or hypertension. R. 503. A heart patient with hypertension added is much greater risk. R. 512. A long hypothetical question was then asked based upon suppositions of Harold's record with the answer that he would have been rejected had the witness known these facts. R. 515.

Dr. Wiley Roosth, a Witness for Plaintiff, a brother of Harold Roosth. Finished clinic building in 1956 after a year's planning. Harold started to buy mortgage insurance and ended buying life insurance, increasing it from $26,000 to $50,000 or $100,000 R. 520-521. Harold did full day's work for last two years of his life and never told me he had hypertension. From my contact with him, I would say he did not. R. 525. Occasional high blood pressure can happen to anyone in times of stress. True hypertension is a persistently high blood pressure—goes up and stays up. R. 526. Bennie Roosth had severe hypertension in 1950—had affected his heart and kidneys. R. 527. Harold was his doctor and decided to take him to Dr. Smithwick at Massachusetts

Memorial Hospital; it was Harold's decision whether Bennie should have the serious operation, the most extensive sympathetic operation Dr. Smithwick did. R. 529. They had to postpone the operation because his kidneys were not good enough to stand it. The strain on Harold was enough to cause anybody's blood pressure to rise. R. 530. Harold never complained of high blood pressure or headaches. R. 531. Our family history was that our mother had died of a kidney condition resulting from childbirth. R. 532. Plaintiff's Exhibit No. 6—death certificate for mother—shows she died of heart block and chronic nephrities. Nephrities is a kidney ailment which might result from childbirth and in turn cause heart block—a too slow beat of the heart, insufficient to sustain life. R. 533. There is no family history that mother died from hypertension. R. 535. We considered that Bennie was the patient, not Harold, at Massachusetts Memorial Hospitals. R. 540. Harold did not tell me after his 1951 examination that he was pronounced subject to essential hypertension. R. 542. After his 1953 examination he told me they were pleased with his condition, that nothing was wrong with him in particular. R. 543-544. I took Harold's blood pressure on occasions and it was never high. R. 552.

Dr. C. B. Young, a Witness for Plaintiff. Harold Roosth's doctor after 1949, after his heart attack. He consulted me at intervals, and I took his blood pressure three or four times and examined X-ray and electrocardiograms. R. 555. He probably discussed his condition with me. He was concerned about his heart only. Never mentioned hypertension. I do not believe he had hypertension. R. 556. Doctors dis-

agree on what hypertension really is and when a patient has it. R. 556. In my opinion, a person is not hypertensive until he has consistently known high blood pressure, even while asleep. When it goes up during excitement, but then goes down, it does not indicate hypertension. R. 557. Long standing hypertension affects the kidneys, the size of the heart, affects the electrocardiogram and the vessels in the eye. If the eye grounds examination was normal in 1950, 1951 and 1953, it would indicate he did not have hypertension or even highblood pressure; it shows up fairly early in the eye grounds. R. 558. Harold's worry over Bennie's serious condition was sufficient to cause his blood pressure to be elevated — he was an intense individual. R. 560. The pressures which he had while at the Boston hospital in 1950 could have been caused by worry over Bennie. R. 560. Each person has his own normal pressure; what is normal for one person may not be normal for another. R. 562. After reviewing Harold's pressures and his 1951 examination at Boston, says that they are normal, and the same with reference to his 1953 pressures at the Boston examination. R. 563. Took Harold's pressure about a week before his death. If it had been above normal, I would have recalled it. R. 565-6. From what I know of Harold, I could not diagnose him as subject to hypertension. R. 564. I argued with Harold about prolonged dicoumarol treatment. R. 560. There is danger from the possibility of hemorrhage. R. 567. In my conferences with Harold he never said anything to indicate he believed he had hypertension. R. 568. Harold was being sold insurance, and I advised him to go ahead and take it. R. 571. I examined

Harold for his Lincoln National policy. I wrote the answers and Harold signed it. R. 578-79. I also examined him for the American General Life Insurance Company at about the same time. R. 582. Harold never told me that he was on a salt restricted diet. R. 585. Salt restriction helps control hypertension. R. 586.

Dr. Haskell Muntz, a Witness for Plaintiff. I treated Harold for his heart attack in 1948 (R. 591), and prescribed dicoumarol treatment, though I have no knowledge how long Harold continued the treatment. R. 595-6. Refers to blood pressures taken in 1949, all of which are below 160 90. R. 596. Made an opthalmoscopic examination which did not show hypertensive or sclerotic changes. R. 597. Pressures I found in 1949 are not above normal; not considered hypertensive. R. 601. The danger from dicoumarol treatment is that the prothrombin time will get out of control and cause hemorrhages. Had one patient who had a hemorrhage under the tongue. R. 604. May cause cerebral and subarachnoid hemorrhages. R. 604. Another patient on this treatment vomited blood, all caused by sudden change in prothrombin levels. May have a hemorrhage in the lungs. If the hemorrhage happens where we can get to it, we can stop it, but not if it is in the skull. R. 605. Prothrombin time can change without warning any day, although the dosage remains constant. R. 606. Blood pressure has nothing to do with the hemorrhagic phenomena caused by the prothrombin level. R. 607. Subarachnoid hemorrhages usually are caused from aneurysms. R. 608. Assuming Harold's responsibility for Bennie at the time of his opera-

tion in 1950, this could have caused an elevation of blood pressure. R. 610. Normal persons frequently have episodes of hypertension associated with anxiety. R. 610. Referring to blood pressures which Harold had at his Boston examinations in 1950, 1951 and 1953, says that in his opinion Harold did not have hypertension and required no blood pressure treatment. R. 618-621. He may or may not later developed essential hypertension. R. 622. The cold pressor tests have fallen into disrepute. R. 623. Approximately 50 per cent of the reactors to this test never have hypertension. R. 623. When asked to define hypertension, he asked if the attorney means essential hypertension, then proceeds to define essential as a sustained high blood pressure, a disease. "Hypertension itself means elevated blood pressure." R. 624. Diastolic blood pressure above 90 is above the normal range. R. 630. Hypertension increases the chance of hemorrhage blowing out an atherosclerotic plaque or an aneurysm. R. 646. A berry aneurysm can rupture leaving no trace of its prior existence. R. 646-7. Harold might have had a berry aneurysm so small it was destroyed. R. 646. Refers to Defendant's Exhibit No. 26 showing that Harold was taking two to six grams of salt per day. This would not lower blood pressure. To get control, the salt intake must be less than a gram a day. R. 651-2. Refers to Defendant's Exhibit 3, a retail credit investigator's report signed by Dr. Muntz referring to Harold Roosth's "mild hypertension" and pressures which were under 90, within the normal range. R. 654. Mild hypertension is not essential hypertension. R. 657.

Dr. Arthur Ruskin, a Witness for Plaintiff, one of Harold's doctors. Complete physical examination made of Harold December 2, 1949. R. 660. No heart enlargement and the eye grounds were normal. No indication of hypertension. R. 661. But I did recommend dicoumarol treatment to prevent recurrence of a heart attack. There is danger that the prothrombin time will get off, which could cause bleeding or a cerebral hemorrhage. R. 663. Our last conversation was by telephone in November or December, 1956, about his heart, but without any mention of high blood pressure. R. 664. His pressure December 1952—140 90—and April 1954 130 85 was normal. R. 665. In my opinion diastolic pressure below 100 is normal. Doctors disagree. Some feel that a person's between 30 and 35 should be below diastolic 90. R. 666. Pressures consistently above 100 or 110 are potentially dangerous. R. 667. Refers to Defendant's Exhibit 37, the letter from Ruskin to American General, 1943 is a typographical error, should be 1953. Where it says Report from Massachusetts Memorial Hospitals noted essentially the same findings and E. K. G., this refers to approximately the same blood pressure. R. 670. Referring to Harold's pressure November 1950 at the Boston hospital and to his responsibility to Bennie Roosth's dangerous operation, says that the stress could have accounted for Harold's elevated pressures. R. 672. The sodium amytal test at this time is perfectly normal. The pressures shown by his 1951 examination at Boston are normal and his 1953 examination at Boston shows normal pressures. R. 673. The pressures taken by Dr. Muntz in 1949 were normal. The eye grounds test in 1950, 1951 and 1953 at

Boston are normal, and indicate that true hypertension was not present. The eye grounds is the most delicate indication showing the state of the arterioles. R. 676. Salt restriction in the diet to a half a gram a day controls pressure, but greater portions of salt do not. R. 676. Rauwolfia series drugs are mild sedatives and depressants of blood pressures used in the early stages of essential hypertension and drop the blood pressure relatively little. There are blocking drugs with much more severe effect. R. 678. Referring to the post cards—Defendant's Exhibits 7 and 7A—written by Harold Roosth to Dr. Smithwick show Raudixon (Rauwolfia) was doing very little good. R. 678-9. I never advised Harold he had hypertension of the essential type (R. 679), and in my opinion, he did not have. R. 680. I don't think he ever had essential hypertension. R. 681. Atheramatous plaques are fat deposits in the blood vessels. R. 682. They are often found in very young persons and increase with the aging process. R. 682. Can occur independent of hypertension. R. 682. I disagree with Dr. Grollman's diagnosis that Harold was definitely afflicted with hypertension; and with Dr. Kinzey. R. 696. When Harold referred to his own hypertension (in correspondence referred to by the attorney), "I suppose he meant high blood pressure, which is not the same thing." R. 696. Blood pressure such as Harold had would hardly decrease his life span, considering his heart attack. If he had sustained hypertension, it would. R. 703. The diastolic pressure should be from 110 to 130, consistently to indicate hypertension. Such a mild restriction of salt would be ineffective to reduce blood pressure. R. 705. Hypertension is just a term

meaning high blood pressure — arteriole blood pressure. R. 706.

SUMMARY OF EVIDENCE FAVORABLE TO PLAINTIFF ON ISSUES WHICH SHOULD HAVE BEEN SUBMITTED

A. GOOD HEALTH: The eye grounds examinations of Harold were normal in 1950, 1951 and 1953. The heart size was normal at all these times (essential hypertension leads to enlargement of the heart). Mrs. Roosth and Dr. Wiley Roosth said Harold lead a normal life, did a full day's work for two years prior to his death, and had an appearance of good health. Dr. Grollman said one of the treatments for elevated blood pressure was avoidance of stress and strain (R. 357), but Harold did not avoid it. In order to control blood pressure by reduction of salt or sodium, it must be below one gram per day according to Dr. Ruskin (R. 676) and below a half gram according to Dr. Muntz. R. 651-2. The record is conclusive that Harold never reduced his salt except within the range of two to six grams per day (Defendant's Exhibit No. 26), and according to Mrs. Roosth, this was done to lose weight. R. 70. Doctors Young, Ruskin and Muntz believed Harold was in good health except for his prior heart attack. Dr. Kinzey's diagnosis of essential hypertension was likely based on the cold pressor test, a test which Dr. Grollman and Dr. Muntz agreed was not currently used and was in disrepute. R. 376-623.

B. ABSENCE OF FRAUDULENT INTENT: Harold never expressed an opinion to his wife or to Doctors Muntz, Young or Ruskin that he believed himself to be in ill health except for the concern about the history of the prior heart attack. (In *World Insurance Company v. Pipes, 5 C. C. A. La., 255 Fed. 2d 465*, it was a matter of importance that the insured had not told his wife or close friends that he had Bright's disease as opposed to the insurance company claim that he knew he had the condition.) None of the doctors ever advised him that, in their opinion, he had essential hypertension. Dr. Smithwick's letters of inquiry referring to "your hypertension" were form letters apparently addressed to all patients and did not distinguish between hypertension in the form of a disease and a simple elevation of blood pressure. Harold told his wife after the 1953 checkup that they found him to be O.K. R. 62-3. Dr. Ruskin, in his letter to Harold on September 10, 1953, Defendant's Exhibit 44, encouraged him to believe that he was in good health and had no reason for concern. Harold's initial application was for $26,000 mortgage cancellation life insurance. Edwards, the life insurance salesman, induced him to increase it to $50,000, which negatives the idea that Harold originally embarked upon a fraudulent scheme. R. 121. The post cards (Defendant's Exhibit 7A) dated January 24, 1957, indicates that Harold believed that the general state of his health was "excellent."

C. MATERIALITY AND RELIANCE: Plaintiff's Exhibit 5, the excerpt from Lincoln's manual, indicates that

blood pressures five years prior are to be disregarded and that blood pressures under 170/106 during the interval from three to five years prior are to be disregarded. The only time Harold's pressure was above normal, according to Dr. Ruskin, was in 1950, and his pressure was never above 170/106 during the five-year period. Lincoln was a leader in issuing policies on sub-standard risks. R. 487. Dr. Ruskin's letter to American General Life Insurance Company, which admittedly was in the possession of Lincoln at all material times, clearly gave notice that Harold had been examined at Massachusetts Memorial Hospitals, and although it stated the date as June, 1943, the letter shows on its face that this was a mistake because the examination was after his 1948 heart attack. Mr. Balay, the Lincoln underwriter, although he knew of Harold's prior X-rays, electrocardiograms or blood studies at Massachusetts Memorial Hospitals from Dr. Ruskin's letter (R. 480), said he did not care to have the full particulars.

D. RAUDIXON: According to the post card, Defendant's Exhibit 7, Harold took Raudixon, a Rauwolfia drug, at some time in 1956. Dr. Grollman says it is a good tranquillizer, but is not impressed with it for hypertension (R. 364); that Harold's pressure was lower after he discontinued Raudixon in 1957 than it was while he was taking it. R. 394. Dr. Kinzey says the drug is sometimes used as a sedative. R. 270. After Harold had discontinued the drug, in January 1957 he felt himself to be in excellent health. (Post card—Defendant's Exhibit No. 7A.)

E. CAUSE OF DEATH: Dr. Muntz explained the dangers of prolonged dicoumarol treatment and said that in his opinion, this was probably the cause, that a hemorrhage could result from dicoumarol poisoning without any high blood pressure. Dr. Mullowney expressed a similar view. All doctors agreed that dicoumarol is a dangerous drug. Death might be caused by this drug as well as by essential hypertension as suggested by certain doctors.

F. DEATH OF HAROLD'S MOTHER: The testimony relied upon by the Defendant was taken from the records of the Massachusetts Memorial Hospitals showing that the cause of her death was hypertension or cardiovascular accident. Opposed to this is the death certificate, Plaintiff's Exhibit 6, which shows heart block and chronic nephritis, which was explained by Dr. Wiley Roosth to possibly mean a kidney ailment developed after childbirth which caused heart block. There was the family history that Mrs. Roosth died from childbirth. These conflicting ideas presented jury questions. Coupled with this is the fact that Harold was of such tender age he could hardly have known what caused her death.

G. ESTOPPEL BASED UPON DR. RUSKIN'S LETTER: This letter is Defendant's Exhibit No. 37, dated February 24, 1955, written by Dr. Arthur Ruskin to American General Life Insurance Company which was then considering the issuance of a policy to Harold Roosth. This insurance was to be reinsured by American General with Lincoln National. In connection with the reinsurance file

Lincoln National was furnished with the letter, which reads as follows:

"February 24, 1955

American General Life Ins. Co.
P. O. Box 1931
Houston, 1, Texas
Attn.: Dr. Ghent Graves, Medical Director

Dear Dr. Graves:

Dr. Roosth has been under my care since December 2, 1949, at which time the second ECG sent you was taken. He had a myocardial infarction in August 1948; was treated in Tyler and recovered uneventfully. At that time G.I. series, gall bladder series, barium enema, all negative. I have seen him frequently until June 1954. During all this time he has never had any symptoms and his physical examination, including size of heart fluoroscopy of the heart have always been negative except for blood pressure findings—highest on December 2, 1949, 150 100, but always since then below 140 90. He has taken excellent care of himself, including prolonged anticoagulant therapy under my direction. Report from Massachusetts Memorial Hospital on June 1943 noted essentially the same findings and ECG (Q2 and Q3). Urinalysis, blood count and sedimentation rates all normal. Prompt return of ECGs will be appreciated.

With best wishes,

Sincerely yours,

/s Arthur Ruskin, M.D.
Arthur Ruskin, M.D.
Assoc. Prof. Int. Med.
Univ. of Tex. Med. Br.
Galveston, Texas"

It is apparent from an analysis of the letter that the date of the Massachusetts Memorial Hospital report June *1943*

is in error, that the report must have been after the heart attack in 1948 because it refers to ECGs (electrocardiograms) as they reflect on the result of the heart attack. Dr. Ruskin said that it should have been 1953, but anyway, Lincoln was put on notice that the date should have been after 1948.

It is apparent that the Massachusetts Memorial Hospital examination extended to blood pressure examinations. Mr. Balay, the Lincoln underwriter, acknowledged that he learned from the letter that Harold had had blood studies in Massachusetts Memorial Hospital, but did not feel that further inquiry was necessary. R. 480. It is well established that where a life insurance company issues a policy with knowledge that certain misrepresentations have been made in the application that it waives or is estopped to rely upon the misrepresentations as a means of avoiding a policy. *Union Assurance Soc. v. Toliver (5 C. C. A.), F. 2d 405, 408; Perry v. Citizens Life (C. C. A.), 163 S. W. 2d 743, 747; Baker v. Ft. Worth Mutual Benefit Assn. (Com. App.), 280 S. W. 165; Terry v. Prudential (C. C. A.), 77 S. W. 2d 761; American Fire & Casualty Co. v. Eastham (5 C. C. A.), 185 F. 2d 729.*

In their Petition for Certiorari and supporting brief Petitioners indulge in the assumption that Harold had essential hypertension and then charges him with concealing it. "Much saying" is their substitute for the conclusive proof the law requires to take the case from the jury.

If Harold was not in "good health" as that term is analyzed in *Texas Prudential Ins. Co. v. Dillard (S. Ct.),*

307 S. W. 2d 242, then fraud and deceit become moot. We submit that "good health" is a jury question in view of the conflicting testimony of the doctors and the ambiguous or conflicting statements of Harold himself. If the Court agrees that Petitioner's arguments on misrepresentation and fraud are based on not conclusive evidence of bad health, they fail to justify taking the case from the jury.

Petitioner disregards the testimony of Dr. Young, Dr. Muntz and Dr. Ruskin that Harold did not have essential hypertension or hypertension as a disease, but simply an elevation of blood pressure in 1950 due to the stress and strain under which he was laboring when Bennie was being operated.

Petitioner disregards the explanation of Harold's correspondence with Dr. Kinzey and Dr. Smithwick where he refers to "my hypertension" as meaning an elevation of blood pressure, not the disease. The explanation is that "hypertension" may mean only an elevation of blood pressure which is not a disease, or it may mean a disease. See testimony of Dr. Grollman (R. 353), Dr. Muntz (R. 624), Dr. Ruskin (R. 706). Dr. Muntz said,

> "Normal persons frequently have episodes of hypertension associated with anxiety." (R. 611.)

In stating that Harold admitted he had the disease, Petitioner disregards Dr. Kinzey's testimony (the doctor upon whom they rely to establish that Harold had intermittent essential hypertension) where she says,

> "He felt that he was under a strain and he felt if he took off weight, he would be all right." (R. 268.)

They say essential hypertension is a disease without possibility of recovery, that Harold being a competent doctor must have known this. Does this statement indicate such a belief? Rather, it fits our explanation that the only time he believed his blood pressure was above normal was when he was under strain, a condition which he could correct. This does not sound like conviction that he had an incurable disease which would be particularly dangerous considering his prior heart attack.

They disregard the testimony of Dr. Ruskin, who said Harold did not have the disease. He said:

> "Q. And with reference to a person of Harold's age, what do you consider to be the normal range of pressures?
>
> "A. I personally, and many other authorities, consider any diastolic pressures below a 100 as normal. Diastolic pressure of 110 and above would definitely be above normal." (R. 466.)

They disregard their own star witness, Dr. Grollman, where he says:

> "Q. You have referred to normal pressure, there is really no such thing that you can pick out any individual and say that his normal pressure is so much and if he is over that, he is above normal and if he is below it, he is subnormal, isn't that true, doctor?
>
> "A. Strictly speaking, that is true, sir. There is a biological variation.
>
> "Q. What is normal for one person may not be normal for another person?
>
> "A. Within, considering the circumstances, that is why you have to—

"Q. Well, you have to consider the person as an individual and not judge him by some statistics that have been made up by some doctor on a thousand people?

"A. Right." (R. 414.)

They disregard their own manual where it says to disregard pressures under 170/106. Plaintiff's Exhibit 5.

If one thing was proven with certainty during the trial of this case, it is that the doctors have different opinions as to what is a normal blood pressure.

Dr. Grollman's testimony that death was caused by hypertension plus atheromatous plaques (R. 310) was based on his assumption that there was no rupture of an aneurysm (a congenital defect). Dr. Grollman says that death was not caused by ruptured aneurysm because the autopsy report prepared by Dr. Mullowney shows that Dr. Mullowney did not find an aneurysm (R. 370). Yet Dr. Mullowney, when he testified on the witness stand, said that the hemorrhage was of such magnitude that it might have exploded the neurysm leaving no trace of its prior existence; that the fact that he did not find an aneurysm did not prove there was none (R. 316).

The low salt diet which Harold followed, they say, conclusively shows that he was treating himself for essential hypertension. This entirely disregards the testimony of Doctor Muntz (R. 651) and Dr. Ruskin (R. 676) that salt restriction in the diet does not have any effect of lowering the blood pressure unless the salt intake is reduced to below one gram or one-half gram per day; disregards Dr. Groll-

man's testimony that salt restriction must be "strict" if it is to lower blood pressure (R. 358). Disregards the testimony of Mrs. Roosth that Harold started a low salt diet after his heart attack in order to reduce weight (R. 65-66, 70). The evidence conclusively shows that the only reduction of salt in his diet was down to two or six grams per day (R. 651); not sufficient to control blood pressure. Again, Harold being a doctor would have lowered his salt to the extent necessary to lower blood pressure if that was his purpose.

They say that Harold knew his mother had died from cerebral vascular accident or hypertension, relying upon statements in exhibits from the files of Massachusetts Memorial Hospitals. They refer to the paper styled Preoperative History (R. 227-228) copied in Appellee's Brief, p. 12, where it says:

FAMILY HISTORY OF HYPERTENSION

MOTHER	FATHER
Died 39	Died 61
Hypertension	Heart Attack and Gout

PATIENT
DR. H. ROOSTH

This does not say that his mother died of hypertension any more than that his father died of gout, merely that they had it. No one ever died of gout. Defendant's Exhibit

17—the personal history statement taken by Dr. Horowitz —contains the statement:

"Mother died at 39 of cerebral vascular accident."

This does not say she had hypertension, disease or otherwise. It is hardly consistent with the death certificate which shows she died from "heart block and chronic nephritis"—Plaintiff's Exhibit 6. Nor is it consistent with the testimony of Dr. Wiley Roosth that the family history of the Roosth family was that his mother had died as a result of childbirth, that chronic nephritis might result from childbirth and that heart block might develop from chronic nephritis. Such evidence is hardly the conclusive testimony necessary to support an instructed verdict.

Mr. Balay, the underwriter, would not say the policy would have been denied if he had believed Harold's mother had a cardiovascular accident.

"Q. Do you suggest that you would have denied this policy if you had information that this man's mother had some form of cardiovascular trouble?

"A. No, sir, not necessarily.

"Q. But do—you do make such allegations in the answer, do you not?

"A. I don't know.

"Q. Generally to that effect?

"A. I don't know. I have never made any statement about that at all." (R. 483.)

They say they would not have issued the policy if they had known that Harold had been a patient of the Smithwick group or Medical Associates, but they were willing to

disregard knowledge that he had been a patient at Massachusetts Memorial Hospitals which made findings as to his heart and blood pressure. Apparently referring to Dr. Ruskin's letter (Defendant's Exhibit 7), Mr. Balay said:

> "Q. Then, I will ask you this question: did you know at the time this application was being considered by you or at the time you acted on the application in behalf of the Lincoln National Life Insurance Company that Dr. Harold Roosth had been in fact in the Massachusetts Memorial Hospital for observation treatment the years in November, 1950, did you know that at the time you were acting on this application?
>
> "A. There was an indication in the file that he may have been in the Massachusetts hospital in 1950, but I didn't know that he was." (R. 428.)
>
> "Q. You stated a moment ago that you had some information to the effect that while you were examining this application that Dr. Roosth had been to the Massachusetts Memorial Hospital previously at some time and I will ask you what was the source of that information?
>
> "A. The source of that information was a letter written to the American General Life Insurance Company.
>
> "Q. Was it a letter or a copy of a letter?
>
> "A. It is a photostatic copy of a letter written to American General Life Insurance Company February 24, 1955, and signed by Arthur Ruskin, M.D." (R. 429.)

It comes to mind that the insurance company witness considers "material to the risk" differently after the insured is dead, that matters first thought immaterial now are all important.

AUTHORITIES CITED BY PETITIONER— FEDERAL CASES DEALING WITH NATIONAL SERVICE LIFE INSURANCE POLICIES

These are the cases which are relied upon primarily by the insurance company. They deal with Federal law. They all arise where a policy of National Service Life Insurance, after lapsing, is reinstated upon the application of the insured in which he makes misrepresentations of fact concerning his health and medical treatment. It is necessary where misrepresentations are proven, to establish that they are material to the risk and were made with the intent to deceive the Government, quite similar to the requirements of the Texas law. In practice, however, the Federal law has been more strict in holding that materiality and intent to deceive become law questions. Whereas the Texas courts in Texas cases have required proof that there was an actual conscious intent to deceive, and this intent will not be drawn as a matter of law from the fact that the misrepresentation was knowingly and intentionally made.

In discussing these cases, however, we note that the facts in our case are such that even under the Federal law, it would still be a fact question whether the alleged misrepresentations were made with intent to deceive.

The leading case is *Pense v. United States, 316 U. S. 332, 86 L. A. 1510.* Pense's National Life Service policy lapsed in 1920 and was reinstated in 1927 based upon his application which represented that he had not been treated for throat, heart or stomach and had not consulted a doctor

since the policy lapsed. Actually, he had been examined in 1925. In 1928 he had applied for compensation because of chronic sinusitis ethmoidities atrophic rhinitis and myocardidis and had stated that a physician had treated him for these ailments. In 1931 and 1933 he applied for other benefits, stating that since 1918 his heart had been [illegible] and that he had the above disease from 1920 until 1925. The court held that the jury could disbelieve Dr. Glickman's testimony concerning Pense's ailments (presumably because it was an expert's opinion) but could not disbelieve that an examination had been made. From Plaintiff's admissions in the applications for compensation made in 1928, 1931 and 1933, the Court presumed as a matter of law that he had the intent to deceive in the absence of any subsequent denial or contradiction by the insured of his prior statements in the application of compensation. The dissenting opinion of Murphy, J. J., concurred in by Clark and Douglas was that the statement in the reinstatement application that Pense was in good health and other circumstances being in conflict with the applications for compensation created a fact question.

With reference to intent, the Court said:

> "From these facts, the requisite intent to defraud is presumed, and therefore need not be proven in the absence of *countervailing evidence*." (Emphasis ours.)

In our case countervailing evidence exists, evidence showing that Harold Roosth actually was not afflicted with any disease and actually believed himself to be in excellent health at the time he made the application.

McDaniel v. United States, 5 C. C. A. 196 F. 2d 291, was in line with the *Pense* case, a reinstatement of a National Service Life policy was involved. The representation was that he was in good health and had not been treated by doctors since the policy lapsed. It was stipulated that the answers were incorrect. The Plaintiff had been diagnosed as having Hodgkins disease for which he had X-ray therapy. The only issue was whether he had a fraudulent intent. He knew that he had a serious disease. There was no countervailing evidence that he was actually in good health or that he believed he was in good health as in our case. On the contrary, he had claimed disability benefits and had been rated 70% disabled. From this the Court presumed the intent to defraud as a matter of law.

United States v. Stratton, 5 C. C. A. 232 Fed. 2d 880, was a similar case and a similar result was reached. On the same day that he paid the premium for the reinstated policy, he had blacked out. The misrepresentations were made only a week before he was to have electroencephalogram examination for brain injury. The jury found for the insured, but the Court reversed and rendered. There were no countervailing circumstances to show actual good health or against the legal presumption of fraudulent intent. Nevertheless, there was a dissenting opinion by Justice Cameron that the trial judge and the jury were in a better position than the appellate judges to determine the state of mind of the insured on the question of fraudulent intent.

In *Cardwell v. United States, 5 C. C. A. 186 Fed. 2d 382*, the Court recognizes that the distinction exists from the

Pense case which we have mentioned. The reinstatement application of a National Service Life Policy contained misrepresentations concerning good health and consultation of doctors, the Court held that the question of fraudulent intent *was for the jury and not the Court;* because there were circumstances indicating the possibility of good faith. Referring to the *Pense* case, the Court observed that

> "His admissions left no room for conjecture as to the falsity of previous statements in the application for reinstatement and of his knowledge of such falsity and on the basis of these facts held that the requisite intent to defraud would be presumed and therefore need not be proven in the absence of countervailing evidence."

In some states, and in some Federal decisions, intent to deceive has been presumed as a matter of law from the fact that the misrepresentations were knowingly made by the insured, but such is not the law in Texas. Likewise materiality to the risk has been determined as a matter of law from the wording of the application, but not in Texas.

Equitable Life Insurance Company v. Alvarez (5 C. C. A.), Tex. 141 F. 2d 551, Opinion by Judge Hutcheson, is illustrative of the point. The application for insurance represented (1) that the insured had none of the illnesses referred to and (2) had not had X-ray examination. Actually, these were misrepresentations because he had X-ray examinations about six years before and a second set of X-ray examinations about a year later, which showed a tumor of the lungs. The insured was a medical student at the time of the examination. The tumor became malignant and apparently was the cause of his death. Held that under

the Texas law it was for the jury to decide (1) materiality to the risk, and (2) whether there was a willful design to defraud. The Court says that *Metropolitan Life Insurance Company v. Madden (5 C. C. A.), Fla., 117 F. 2d 446*, does not apply; that *Madden v. Metropolitan Life Insurance Company (5 C. C. A., Fla.), 138 F. 2d 708*, does apply, that the law of Florida, as announced in the latter case, is the same as the law in Texas and requires the submission of the case to the jury.

In order to show how closely analogous the *Alvarez* case is, we must analyze the two *Madden* decisions, actually the same case twice decided. Judge Hutcheson wrote both opinions.

In the first decision of the *Madden* case *(117 F. 2d 446)*, the Court reversed the jury decision for the Plaintiff and held that as a matter of law the misrepresentations were material and were made with intent to deceive. In the second decision, *138 F. 2d 708*, the court reversed itself and under the same facts held it was a fact question for the jury whether the representations were material and made with the intent to deceive.

The change of decision was because under State law materiality and fraudulent intent were not to be presumed from the Court's belief of materiality to the risk and that the answers were knowingly false. The misrepresentations were in answer to questions in the application (1) that the insured had no stomach ailments, (2) that he had not attended a hospital or been treated in five years. Actually, he had cardiospasm (a stomach ailment) and had been

treated for it. In the first decision, the court said, "the evidence as to both materiality and the falsity of the answer was conclusive. * * * it was material as a matter of law, and as here, the answer was, and was known to be, untrue, its giving prevented recovery on the policy without regard to whether the answer was given with a conscious fraudulent purpose to deceive." (451)

At the second trial, the trial judge instructed a verdict on the same evidence, but the Circuit Court sent it back for a jury trial because it found the State law required it. Referring to a State Court decision, the Court said:

> "In so ruling, the Florida Supreme Court, expressly rejected the distinction made in the Madden case, and accepted by most of the Courts in the country, between a statement of opinion as to whether the insured had suffered from particular ailments and of fact as to whether he had or had not consulted a physician. It was taking its place with courts which hold that, where a statute or policy, as here, provides that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, a representation, though false, does not avoid the policy unless it was made with conscious intent to deceive; that whether it was so made is normally for the jury; and that (even though a question relates to matters of fact such as whether there was a consultation rather than of opinion as to whether insured was ill or suffering from a disease), unless the evidence admits of no other conclusions than that there was an intent to deceive, it is for the jury to determine whether the answer was fraudulent in fact, that is, made with intent to deceive or whether it was given in good faith, that is, without conscious intent to defraud. Since we are bound to follow where Florida courts lead in cases governed by Florida law, it is sufficient for us, with-

> out more, to determine, as we do, that, under Florida law, plaintiffs were entitled to go to the jury on the issue of intentional or conscious fraud; and that, as to all three of the policies, Florida law governs."

Clark v. National Life Insurance Company, Sup. Ct., 200 S. W. 2d 820, is a leading Texas case. A policy of life insurance was issued April 21, 1943, the insured died February 26, 1945. The defense was that he had heart disease and had been treated by a physician for heart disease, but had failed to disclose it in answering questions in the application. It was contended by the insurance company that the evidence shows as a matter of law that he was guilty of fraud. The doctor who treated him ten or twelve times between 1942 and 1944 said: "I am pretty sure I did (tell him he had heart disease) because I admitted him to the hospital on the same day. I am sure I told him he had a heart ailment." He died of cerebral hemorrhage with hypertensive heart disease as a contributing cause. Held that the intent to deceive had not been proven as a matter of law.

> "It is also well settled in this State, that to avoid a policy of insurance because of misrepresentation, the burden is on the insurer to plead and prove, not only that the answers made by the insured were false or untrue, but that the insured knew or should have known that they were untrue and that he made them wilfully with the intention of inducing the insurer to issue him a policy."

Washington National Insurance Co. v. Anderson (Dal. C. C. A.), 94 S. W. 2d 263. Life insurance policy issued August 17, 1933. The insured died October 13, 1933. At the time the policy was issued, he represented by the appli-

cation that he had had no serious disease for the past two years and had not been examined by a physician and was in sound health. A reputable physician testified that in May, 1933, he had examined the insured and found him to be suffering from aneurysm of the aorta superinduced by syphilis in advanced stage. He treated him three times during the next few weeks and after his death made a postmortem examination which confirmed his prior diagnosis. The insured's wife testified that at the time of the issuance of the insurance they had been married for seven years, that the insured had been in good health, and had done manual labor continuously up to the time of his death, that to her knowledge he had never been treated for any disease other than for the flu and that he had always been in good health. Although the evidence was more cogent in favor of the insurance company, still the court held that it was within the province of the jury to find directly contrary to the testimony of the physician and awarded recovery on the policy.

Great Southern Life Insurance Company v. Doyle (Com. App.), 151 S. W. 2d 197. After default in the payment of premiums, the insured applied for reinstatement on December 18, 1935. She died March 4, 1936, from apoplexy. The company was not obligated to reinstate unless it approved her insurability at that time. This approval was granted upon the basis of her application for reinstatement. The following answers were given:

> "2. Have you had any injury, sickness or ailment since this policy was issued—appendectomy April 1935 —O. K.

"3. Have you consulted a physician since this policy was issued—No.

"10. Do you believe you are now in absolutely first-class health—Yes."

Contrary to these answers it appeared conclusively that she had undergone a clinical examination and the doctor who made it testified that he had advised her on March 4, that she had syphilis and should be treated. Her family doctor (another doctor) testified that he treated her for the disease from May to August, 1935, but could not say whether he told her she had the disease. The jury found that she did have syphilis during the time inquired about; that she did not know of it; that her syphilitic condition was material to the risk; that she was not in good health at the time of reinstatement; that she did not know her answer to Question No. 2 was false; that she did not know that she was concealing her condition; that she believed that she was in first class health at the time she made the application; that she did not answer Question No. 10 for the purpose of deceiving the company; that her physical condition at the time was material to the risk. The trial court rendered judgment for defendant withstanding the jury verdict. The Court of Civil Appeals reversed and rendered the judgment in favor of the insured and the Commission of Appeals affirmed the Court of Civil Appeals. The decision was based upon the absence of willful intent to deceive. It is readily seen that her answer that she had not consulted a physician was false and that she was bound to know it was false, and the jury found it was material to the risk. Still the jury was privileged to find that she did

not have the willful intent to deceive. This is in line with Judge Hutcheson's opinion in *Equitable v. Alvarez, 141 Fed. 2d 551.*

GOOD HEALTH—A FACT QUESTION

Vann v. National Life and Accident Insurance Company, Com. of App., 24 S. W. 2d 347. The life insurance company defended on the ground that Mrs. Vann, the insured, was not in sound health at the time the policy was issued, that she was then suffering from a cancer of the uterus. The policy provided that it should not be effective unless the insured was in good health at the time it was issued—May 17, 1926. Her husband testified that she was the mother of six children; that she was treated by Dr. O'Bannon in March, 1926, X-ray treatments; that Dr. O'Bannon told him she had a bad cancer and was likely to die; she left the hospital in April and from then until August 15 she appeared to be in good health so far as he could tell; she did the cooking and her usual work; he took her back to see Dr. O'Bannon who said she was in as good health as anybody.

The thirteen year old daughter testified that her mother did not appear to be sick, and "I did not hear her complain of any sickness or pain during that time."

Dr. O'Bannon said that he examined her March 28, 1926, that she was afflicted with cancer, that he treated her with X-ray and radium and discussed with her the nature of her ailment, and he explained to her the chances that she would die. But said she said she was feeling much better and

that she was going to surprise him by getting well. She was much better after the X-ray and radium treatments, appeared to be getting along satisfactorily. It is possible for cancer to be retarded and for a person to feel well and go about doing her work, that so far as the person herself knew she might have believed she was in ordinary health until the cancer recurred.

Dr. Lundey testified that the extent of the development of the cancer and the time of her death indicated that she must have had the cancer at the time the policy was issued, that she was never free from it from the time it was first discovered.

The jury found that at the time the policy was issued the insured was in good health. The Court of Civil Appeals reversed and rendered but the Supreme Court sustained the jury verdict.

Coxson v. Atlanta Life Ins. Co. (S. Ct.), 179 S. W. 2d 943. Life insurance policy provided that it should not be effective unless the insured was in good health at the time it was issued. The jury found that he was in good health. The Court of Civil Appeals reversed and rendered and the Supreme Court reversed the Court of Civil Appeals and affirmed the trial court. The question was whether the insured had tuberculosis at the time. Policy was issued March 3, 1941, and insured died of tuberculosis July 25, 1942. The insured was admitted to the hospital two months after the issuance of the policy. He signed an application for admission showing that he had been sick for the past two and a half years. The proof of death signed by the

beneficiary and by the doctor showed that he had been ill with tuberculosis since about June 1, 1941.

Other testimony showed that at the time the policy was issued he had an appearance of good health, worked regularly, ate heartily and complained of no ill. Insured's sister testified about his appearance of good health, how he did heavy manual labor and missed only one day's work for a long time.

Held that this testimony raised an issue of fact whether he was in good health at the time the policy was delivered, and that the opinion of experts may be offset by the testimony of lay witnesses on the question of health.

The Fifth Circuit dealt with a Texas case in *American Home Life Insurance Company v. Zuniga, 228 Fed. 2d 403*, a case which reviewed the Texas decisions on the sufficiency of evidence to raise a fact question on health questions. 2-5-53 application for $10,000 life policy. 2-23-53 policy delivered. Contained provisions that the policy should be effective only if delivered during insured's good health. 4-1-53 insured consulted a physician about throat trouble. 4-1-53 biopsy failed to disclose cancer. 8-13-53 operation removed cancer from throat extending down into stomach more cancerous. Death 2-12-54 of cancer of the throat and stomach. Four doctors testified but only one of them said positively that he must have had the cancer at the time of the application but the others were unable to express a definite date that the cancer developed. Lay witnesses testified that he appeared to be in sound health, working regularly without complaint until April 1st, without any

loss of weight until after April 6. The jury found that he was in good health on January 23.

The Court notes:

> "Applicable Texas decisions, particularly the late ones, define tests liberal to the insured to be applied in deciding whether the jury's findings should be disturbed."

Held that the testimony of the lay witnesses in opposition to the testimony of the experts raised a fact question.

The Court quoted from *Coxson v. Atlanta Life Insurance Co., 142 Tex. 544, 179 S. W. 2d 943, 945,* as follows:

> "The opinion testimony of experts, although persuasive, under most circumstances is not conclusive. It is peculiarly within the province of the jury to weigh the opinion evidence, taking into consideration the intelligence, learning and experience of the witnesses and the degree of attention which he gave the matter. The judgment and inferences of experts or skilled witnesses even when uncontroverted, are not necessarily conclusive on the jury or the trier of the facts unless the subject is one for experts or skilled witnesses alone, whether the jury or the court can not properly be assumed to have or to be able to form correct opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry."

We submit that these cases are different from such cases as *John Hancock Mutual Life Insurance Company v. Esparza, San Antonio C. C. A., 286 S. W. 2d 695 (N. R. E.).* In that case, as a basis for reinstatement of his policy, the insured made representations (1) that he was in sound health, (2) that during the period when the policy had lapsed he suffered from no disease or ailment, and (3) that

he had not consulted or been treated by a physician. As a matter of fact, he had suffered from an incurable bone cancer which had spread to his hands, arms and chest, had made numerous trips to the hospital for deep X-ray and other treatments for cancer on twenty or more occasions. Here there was no question of his ailment, or of his knowledge of his ailment, or of the seriousness of his ailment, and the close proximity of the treatments to the time of the reinstatement of the policy. The jury finding was set aside and judgment was entered by the court denying recovery.

Texas Prudential Insurance Company v. Dillard (Tex. S. Ct.), 307 S. W. 2d 242, is likewise different from the cases cited and from the case at Bar. It was shown without doubt that prior to the issuance of the life insurance policy (which contained a good health clause) that the insured suffered from the worst form of epilepsy; that all during the period prior to the issuance of the policy and thereafter, he took medicine designed to suppress the symptoms but not to cure the disease. He sustained seizures once a year or at more frequent intervals whenever he discontinued the medicine. The Court notes that "There is no doubt that at the time the policy was issued the insured was afflicted with a disease that produced, and had been producing, the same sort of seizures or convulsions from which he died some nine months later." As opposed to this uncontradicted testimony, there was proof by lay witnesses that the insured appeared to be in good health and led an active life. The jury found against the insurance company

and the court reversed and rendered the decision. In reaching this result, the Court referred to and distinguished *Sovereign Camp v. Derrick, Tex. C. A., 64 S. W. 2d 982*, a cancer case, supra; *Coxson v. Altanta Life Insurance Company, 142 Tex. 544, 179 S. W. 2d 943*, supra; *Vann v. National Life and Accident Insurance Company, Tex. C. A., 24 S. W. 2d 347; American Home Life Insurance Company v. Zuniga, 5th Cir. Tex., 228 Fed. 2d 403*, on the ground that in each of those cases there was evidence indicating doubt as to whether the insured was afflicted with disease at the time the policy was issued, whereas, in the *Dillard* case there was no such doubt. This is exactly the distinction which exists in the case at Bar. There is serious doubt in the evidence whether Harold Roosth was afflicted with essential hypertension at the time he applied for the policy; the testimony is in conflict.

In the *Dillard* case Justices Calvert, Smith and Walker dissented with a strong opinion, expressing the belief that epilepsy should not be included with the few diseases recognized as a matter of law to disprove substantial good health. Essential hypertension has never been recognized in Texas as such a disease. The reason is that a person may admittedly have certain diseases and still be in the relative substantial good health required by the policy if the court or jury so finds as a fact question. The only diseases where it is unquestionably established that the insured had the disease at the time the policy was issued which the Texas Courts have held as a matter of law defeat "good

health" are, tuberculosis, *American National Insurance Co. v. Lawson, 133 Tex. 146;* cancer, *Morris v. Tatum, 152 S. W. 2d 871, no writ of error history;* paresis, *Phipps v. American National Insurance Co., 116 S. W. 2d 800, writ dism.;* pelvic cellutis, *Hughes v. American National Insurance Co., 146 S. W. 2d 470, no writ of error history,* and now epilepsy.

The excellent reason why essential hypertension should not be added to that list is that little is known about it, doctors disagree when a patient has it and what is a proper treatment, and what is its effect. In our case the doctors even disagree what caused the subarachnoid hemorrhage. Such a nebulous condition can hardly be so clear that reasonable minds may not differ. Not even the terminology is clear.

CONCLUSION

The only thing this case involves is an argument of facts, whether the evidence is conclusive or controversial on certain issues. Petitioner has not squarely presented the controversy, it assumes the facts to be in its favor rather than present both sides. Instead it has set up a "straw man" to knock it over, the supposed injustice of failure by the Circuit Court to recognize the authority of the Trial Court to take the case from the jury. They say it is a case of great importance to the insurance industry where actually it is authority for nothing except under its peculiar facts.

We respectfully submit that the Petition for Writ of Error should be denied.

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A copy of the foregoing Respondent's Brief has been delivered to Thos. B. Ramey, Citizens First National Bank Building, Tyler, Texas, Attorney for Petitioner, this 14 day of November, 1959.

CHAS. F. POTTER,